No. 12451

United States
Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, a corporation,

Appellant,

— vs. —

MARY ANN HARRINGTON,

Appellee.

Appellant's Brief

Appeal from the United States District Court for the District of Montana.

Filed ....., 1950

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STATEMENT OF THE PLEADINGS AND JURISDICTION

This is a damage suit for personal injuries by a passenger against the carrier, grounded on negligence. The complaint prays damages of $53,350, and alleges diversity of citizenship. (Tr. 2, Par. I). The answer admits the diversity of citizenship, (Tr. 11), and there is no dispute as to jurisdiction of the court.

Sec. 1332, Title 28, U.S.C.A., Judiciary Code.

The case was tried in Butte, Montana, in October, 1949, resulting in a verdict for the plaintiff for $15,000, (Tr. 16). Motions by the defendant for directed verdict, (Tr. 303), and for judgment notwithstanding the verdict, (Tr. 19), having been duly made and denied, this appeal is taken by the defendant from the final judgment entered on the verdict, (Tr. 16).

Sec. 1291, Title 28, U.S.C.A., Judiciary Code.

STATEMENT OF THE CASE

The accident occurred August 26, 1947, aboard the Milwaukee's new streamliner "Olympian Hiawatha," a short distance east of Seattle, Washington.

A. *Outline of the issues—*

We think this case shifted so unusually from the theory originally pleaded to the theory finally submitted to the jury that a review of the issues may be helpful to the court.

The complaint (Par. III and IV, Tr. 3) alleges in essence that the railroad sold the plaintiff's berth space to someone else, that she was not settled in her own space prior to departure from Seattle, that defendant failed to

assist her to move though she was 75 years old and needed assistance, that while she was moving herself during a station stop the train was violently started without warning and she fell backward, suffering injury.

The acts of negligence charged against defendant are catalogued, (Tr. 6):

a. Duplicating the sale of berth space.

b. Not assisting plaintiff to change to her proper berth.

c. Not warning plaintiff by the train public address system or otherwise that the train was about to start.

d. Not providing proper facilities for plaintiff's coat and hat, by reason of these defects:

1) The hook was small and poorly placed
2) The floor between the seats was a bare slippery composition, instead of rug like the aisle.

The answer is largely a denial of these allegations, together with a plea of contributory negligence by plaintiff in not signalling for the porter or asking assistance to make her move (Tr. 11).

At the close of the plaintiff's case, counsel obtained leave of court to amend the complaint by adding a new allegation of negligence, (Tr. 154):

"e) That the Defendant in the exercise of the highest degree of care knew, or should have known that injuries were liable to be sustained by passengers, and particularly this plaintiff, because of the insecure footing provided by the Defendant in its Tour-alux Coaches in those portions thereof covered by a hard surface composition, namely that portion between the seats provided for occupancy of passengers and particularly should have anticipated injuries to passengers stand-

ing upon such hard surfaced material when the train lurched, swayed or gave an unusual, unexpected or violent jerk."

At the close of the entire case, the court withdrew from the jury's consideration all of the above issues on the ground that there was not sufficient evidence to sustain them, (Tr. 310, 311), but over the defendant's objection (Tr. 329-31) gave the following instructions, (Tr. 311-14):

"You are further instructed that there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant was negligent in having a hard surfaced composition floor material in its Touralux coaches, and, so, the issue of deciding whether the plaintiff could recover is withdrawn from your consideration based upon the mere furnishing of a hard-surfaced composition floor material; and, likewise, you are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant negligently started the train with a violent and unusual jerk. Therefore, that issue is withdrawn from your consideration, so you will not consider those two elements separately in considering the case, but you will consider them together as you will be further instructed by the Court . . .

The defendant, in the exercise of the highest degree of care for the safety of its passengers, is required to anticipate that among its passengers will be persons under the disability of age.

You are further instructed that if you find from a preponderance of the evidence in this case, first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual and unnecessary jerk after a scheduled stop, and second, that the defendant negligently provided insecure footing between seats by a hard-surfaced composition floor on which the plaintiff, traveling as a passenger in Sec-

tion 12, Car A-16, Touralux, was standing at the time the train was so started, and that as a natural and probable consequence of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find a verdict in favor of the plaintiff and against the defendant.

B. *Questions on this appeal.*

1. The defendant at all stages of the case has denied negligence in any respect, and contends that the record, though viewed most favorably for the plaintiff, contains no evidence sufficient to sustain the verdict. If so, defendant's motions for directed verdict, and judgment notwithstanding the verdict, should have been granted. Therefore, the main question for review is whether the evidence sustains the verdict and judgment for the plaintiff, or whether defendant's motion for judgment should be granted.

2. The instruction No. 30, quoted above, (Tr. 313-14), submitted to the jury a twin combination theory of negligence which the defendant objected to (Tr. 329-31) as not only unsupported by evidence but also as conflicting with other instructions given, and as incorrect law. It presented to the jury a concept of negligence which permits two lawful, non-negligent acts to be combined into negligence, like adding zero plus zero and getting one. We contend that this resulted in prejudicial error necessitating a new trial on correct instructions, even if the defendant should not have summary judgment as contended under question one above.

SPECIFICATION OF ERRORS

1. The Court committed error in refusing to grant the defendant's motion for directed verdict upon one or more of the grounds specified by the defendant in said motion, (Tr. 303).

2. The Court committed error in refusing to grant defendant's motion for judgment in its favor and against the plaintiff, setting aside the verdict theretofore returned in favor of the plaintiff in said cause, (Tr. 19).

3. The Court incorrectly charged the jury as follows:

> The defendant, in the exercise of the highest degree of care for the safety of its passengers, is required to anticipate that among its passengers will be persons under the disability of age.
>
> You are further instructed that if you find from a preponderance of the evidence in this case, first, that the defendant's employees negligently and carelessly started defendant's train with a violent, unusual, and unnecessary jerk after a scheduled stop, and second, that the defendant negligently provided insecure footing between seats by a hard-surfaced composition floor on which the plaintiff, traveling as a passenger in Section 12, Car A-16, Touralux, was standing at the time the train was so started, and that as a natural and probable consequence of such concurring and negligent acts, the plaintiff received the injuries of which she complains, then you must find a verdict in favor of the plaintiff and against the defendant. (Tr. 313-14).

to which the defendant objected:

> The defendant excepts to the plaintiff's Instruction designated No. 30, wherein the Court submitted to the jury the combined issue of the defendant's negligence with regards to a sudden jerk and its negligence with respect to the condition of the floor between the seats, the objection being as follows: first, that there is not

sufficient evidence in the record to justify submitting to the jury for consideration the question of whether the defendant negligently and carelessly started its train with a violent, unusual and unnecessary jerk, as stated in the instruction, the evidence being that no such violent and unusual and unnecessary jerk took place; second, that there is not sufficient evidence in the record to justify submitting for consideration of the jury the question of whether the defendant negligently provided an insecure footing between the seats in Car A-16 by reason of a hard-surfaced composition floor, as distinguished from a carpeted floor, and that there is nothing upon which the jury may base a finding of negligence on the part of this defendant in this respect. Next, that the submission of the plaintiff's Instruction No. 30 creates a conflict and confusion with other instructions on the issues affecting the matter of the jerk of the train and the insecure footing by virtue of the composition floor between the seat, the Court having ruled that in the individual instances and separately there is insufficient evidence to go to the jury on either of those theories; and next number, that the effect of plaintiff's Instruction No. 30 is to combine two theories, each of which is in itself insufficiently supported by evidence to establish liability, and that by so combining these theories to establish another theory of liability which would not otherwise exist, the Court is incorrectly stating the law applicable to the case. It is the defendant's contention in this respect that the effect of Instruction No. 30 is analogous to attempting to add zero plus zero to obtain one. (Tr. 329-31).

ARGUMENT

SUMMARY OF ARGUMENT

A. *Law of the State of Washington controls.*

This being an action in personam, transitory in nature, for a tort occurring in the State of Washington, the parties hereto do not dispute the controlling effect of the law of Washington.

B. *General Duty of Carrier to Passenger.*

The Supreme Court of Washington defines the duty as follows:

> "The rule that carriers of passengers should be held to exercise the highest degree of care consistent with the practical operation of the means of conveyance used arises out of the nature of the employment and is based on the grounds of public policy."
>
> Phillips v. Hardgrave, 296 Pac. 559, 161 Wash. 121.

The jury was substantially so instructed, without objection. (Tr. 314).

C. *Was there a negligent, violent jerk of the train?*

1. *Evidence summarized.*

In conformity with Washington decisions we will later cite, the court instructed the jury, without objection, (Tr. 314):

> "You are instructed that the law recognizes that, to a certain extent, jerking, jolting, lurching and swaying of railroad trains is unavoidable in the practical operation of a train, and is reasonably incident to its ordiary and careful operation. Therefore, the plaintiff must show by a preponderance of the evidence that such jerk or jolt, if such did occur, was unusual, extraordinary, unnecessary, and the result of the careless and negligent operation of the train by the defendant."

In the light of this, let us consider the evidence. It is undisputed that the train involved was the Milwaukee's new streamliner, "Olympian Hiawatha," put into service in June of 1947, (Tr. 244), and that plaintiff's fall was in one of the new Touralux sleeping cars. The detail of the car's berth and interior appointments appears in the photographs, Original Exhibits 1 to 1-D, inclusive, (Tr. 21).

It is undisputed that high speed, faulty roadbed, sharp curves, etc., are not involved, as plaintiff's evidence is that the train was *stopped* when she rose to her feet, and then the jerk occurred, (Tr. 47).

It is undisputed that the train was powered with a new Fairbanks-Morse three-unit Diesel electric locomotive, equipped with an automatic governor, (Tr. 253, 258, 265). There were twelve cars behind the locomotive, (Tr. 231).

The engineer, a man of over forty years' experience, (Tr. 243), testified that the throttle is advanced gradually from notch to notch, resulting in gradual acceleration of the speed of the train, (Tr. 258). On cross-examination he testified he did not know how one could create a condition to make a sudden and violent jerk, (Tr. 263); that even if the throttle is advanced too fast, the governor is supposed to take care of it, and there would be no jerking, (Tr. 266). He stated the train is pretty near jerk-proof, (Tr. 266). None of this evidence is contradicted, there having been no expert or technical evidence offered by the plaintiff as to how the alleged jerk could have been caused, or that it was a result of negligence.

With this background of undisputed facts, let us examine the plaintiff's evidence as to a violent jerk. Only the plaintiff herself testified to any jerk, all other witnesses who were conscious of her fall testifying squarely to the contrary, (Mr. Abney, Tr. 296; Mrs. Abney, Tr. 300; Mrs. Burroughs, Tr. 279; Wendy Burroughs, Tr. 284; Love, Tr. 223; Nolan, Tr. 182; Mr. Stratton, Tr. 291; Mrs. Stratton, Tr. 287).

Fair quotations of the plaintiff's direct testimony are:

"Q. Mrs. Harrington, how would you describe the jerk?

A. I couldn't describe it in any other way than like it was two cars went together and my feet went out from under me on the slippery floor. There wasn't any carpet there. My head must have struck on carpet." (Tr. 47).

"Q. Can you describe in any way, Mrs. Harrington, your fall at that time?

A. Well, I can't describe it any more than my two feet went right out when the jerk came from under me. I fell flat on my back." (Tr. 48).

"Q. Did that come from a slight movement of the car, or was it a violent movement, or what was it, Mrs. Harrington?

A. It was a very violent jerk . As I said, it was just like two cars went together, like that. My feet went out from under me and I fell flat, my head striking out towards the aisle." (Tr. 89).

"Q. Have you ever experienced in your travels a jerk like the one which you experienced on this train?

A. I couldn't say that I did. I have often noticed jerks in the train, but I was never standing up on one." (Tr. 91).

On Cross-examination:

"Q. Was the train stopped or in motion, do you know, when you first started to move the hat?"

A. The train was stopped, and I picked it up and when I gave one step down to throw up the hat, the train just gave a jerk, just like that. My two feet went out from under me, and I fell down.

"Q. Is it your thought the jerk occurred as the train started or after it had gotten under way?

A. I was so knocked out, I can't remember that."

"Q. You don't know?

A. I don't know whether it was going then or not. It was just like one car bumped into another, the jerk." (Tr. 102-03).

"Q. You have referred to this as being a jerk like two cars coming together?"

A. Yes, just an awful jerk."

"Q. Am I correct in understanding that you mean by that a jerk such as if they had coupled on another car to the train?"

A. That is what I thought it must have been.

"Q. You thought they were coupling another car on to the train?

A. Yes."

"Q. You didn't mean by that you thought another train had run into the one you were riding on?

A. No, I thought they had put on another car and gave a jerk." (Tr. 106-06).

"A. I was facing the window, and the hook was right along side the window."

"Q. You were not bending over?

A. I was not bending over."

"Q. You had both feet on the floor?

A. Both feet on the ground."

"Q. Did you fall backwards?

A. Fell backwards, yes. My two feet went toward the window and my head went toward the aisle. . . ." (Tr. 107).

It seems to us that the plaintiff's case stands or falls on the above statements. Concerning them, the court told the jury, (Tr. 311):

> ". . . you are instructed that there is not sufficient evidence in the case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant negligently started the train with a violent and unusual jerk."

And yet, on the very same statements, the jury was permitted to find that the defendant "negligently and carelessly started defendant's train with a violent, unusual and unnecessary jerk after a scheduled stop," (Tr. 313), as one element of the twin combination theory of liability.

2. *Washington decisions considered.*

By the law of Washington, we think this evidence is wholly inadequate and insufficient. In its latest decision on a passenger case, the Court re-affirmed its view that mere adjectives are not enough to impose liability.

Nopson v. City of Seattle, 207 P. 2d 674.

Going back to earlier passenger cases, we quote:

"In order to establish liability, there must be evidence of what appeared to take place as physical facts from which it can be inferred that the operator of the vehicle was negligent, or evidence capable of conveying to the ordinary mind a definite conception of some conduct on the part of those in charge of the car, outside of that of ordinary experience, on which a finding of negligence could rest. . . .

'It is too well settled for discussion or for repetition of the reasons that mere jerks and jolts in starting an electric car, however vituperatively described, do not constitute negligence. . . .'

The circumstance that a passenger walking or standing within the car may fall, unaccompanied by some further physical facts showing violence in the operation of the car, is insufficient to establish negligence."

Wade v. North Coast Transp. Co., 5 P. 2d 986, 165 Wash. 418.

These principles are simple, and probably are not themselves in dispute here. It is their application to the evidence that produces disagreement. The most helpful and illustrative Washington decision, for this purpose, is

Keller v. City of Seattle, 94 P. 2d 184, 200 Wash. 573.

The facts involved a fall and injury to a passenger on a city street car, caused by a sudden jerk. Three witnesses described the incident, and the court was considering

whether there was sufficient evidence to go to the jury. The plaintiff's description was:

> "I got up and started toward the forward end of the car and when it gave a lurch, a very strong lurch, and threw me with great force up against the seat and the people on the right hand side of the car. . . . It was a very violent jerk. It threw me forward. . . . It threw me to my knees."

One of her witnesses testified that after the car started there was a jerk as if the brakes had been applied suddenly, swinging her forward. She said the jerk "was very forceful and violent." The third witness testified that it was the most severe jerk she had ever experienced, it threw her forward and gave her knees a sharp bump, knocked her hat to the back of her head and she hit her hat on the person in front of her.

The court quoted the following with approval:

> " 'Accepting as true plaintiff's evidence as to how the accident happened, we are required to determine whether it is sufficient to show that the car was operated in a negligent manner. In a long line of decisions, recently reviewed by us in Smith v. Pittsburgh Rys. Co., 314 Pa. 541, 171 A. 879, this court and the Superior Court have held that statements that a street car 'started violently,' ' started with a violent jerk,' 'started with a sudden, unusual, extraordinary jerk,' 'stopped with a jerk,' 'came to a hard stop,' 'started up all of a sudden, with an awful jerk, and stopped all of a sudden,' and the like, are not of themselves sufficient to show negligent operation of the car, but that *there must be evidence inherently establishing that the occurrence was of an unusual and extraordinary character, or evidence of its effect on other passengers sufficient to show this.*" (Italics supplied).

Applying the law to the evidence, the court concluded:

"We agree with the appellant that the cases sustain its contention as to the testimony given by the plaintiff herself, and by Mrs. Breen, but we do not hold that view as to the testimony given by Mrs. Belarde. It is to be remembered that the car had stopped at the intersection where jerks might be expected to occur in stopping and starting, and was proceeding on its way when this jerk or jolt happened. In our opinion, reasonable men might well believe from Mrs. Belarde's testimony that this jerk was something more than the ordinary jolt or jerk incident to transportation, especially since it occurred when the car was traveling between intersections, and that, in the absence of any explanation on the part of appellant, it laid the foundation for a logical inference that its servant did not exercise that high degree of care which the law imposes upon carriers of passengers; or to put the matter more briefly, that *there was sufficient evidence, in the words of the Endicott case, 'of its effect on other passengers' (Mrs. Belarde) to warrant such an inference.*" (Italics supplied).

However, the court declared this to be the bare minimum:

"Here, the result of the action wholly depended upon the question as to whether or not the motorman operated the car in a negligent manner. The evidence tending to prove that he did was not very convincing and, indeed, was barely sufficient to carry the case to the jury."

Therefore, the problem for this Court is to determine whether Mrs. Harrington's testimony, supplemented perhaps by her Doctor's statement that she had a severe fall (Tr. 79-80), measures up to the minimum requirement of Washington law as exemplified in the Keller case. True, she used the adjectives "sudden," "terrible," "awful" and

"very violent" in describing the jerk, but all the courts seem to agree that words alone are inadequate to characterize the event. What may have *seemed* violent to a 75 year old lady needing assistance to move from one berth to another, (Tr. 4-5, Par. IV), apparently did not impress itself on the consciousness of *any other person on the train,* as there is a total lack of corroboration of the plaintiff's testimony by other witnesses. Not only was there no showing that the jerk had an effect on other passengers, but on the contrary, six disinterested passengers, testifying by deposition, described the train movement in varying terms as smooth and normal. (Tr. 279, 284, 287, 291, 296, 300).

Nor were any physical facts shown from which negligence can be inferred. Actually, the bare fact of her fall itself not only fails to make up the deficiency, but strongly tends to make it greater. From the quotations of the plaintiff's testimony given above, the Court will note that she places herself standing squarely facing the window just before she fell, and that she fell backward toward the aisle. This can only mean that she fell at a perfect right angle to the line of force of a sudden jerk by the train in starting. Had a jerk of the train in starting forward caused plaintiff to fall, it would by the simplest law of nature have caused her to fall *in the opposite direction against the rear seat.* She would have been thrown into the cushioned berth, and certainly not at right angles to the line of force. A sideways lurch, as when a speeding train rounds a curve, could have thrown plaintiff backward into the aisle, but surely no forward jerk could have.

Now, the above is the sum total of the plaintiff's case on this point. If the Washington law is that

> "There must be evidence of what appeared to take place, as physical facts from which it can be inferred the operator was negligent, or evidence capable of conveying to the ordinary mind a definite conception of some conduct . . . outside of that of ordinary experience, on which a finding of negligence could rest," (Wade case, supra).

then we must ask what physical facts or definite concepts appear here. There is no evidence of any casualty to or breakdown in the train facilities, major or minor. There is no evidence of excessive speed or reckless operation to create unusual train movements. There is no evidence of any passenger, except plaintiff, who felt any jerk, jar or unusual motion of any kind. There is no evidence that a car was coupled into the train, befitting plaintiff's description of the jerk. There is no evidence to furnish even a possible explanation of how that new train and locomotive could have produced a sudden and violent jerk, to contradict the testimony of the engineer. The only physical fact in the plaintiff's case is that she fell in totally the wrong direction for a sudden forward jerk of the train to have caused her fall. Therefore, plaintiff's case must stand alone on her unsupported adjectives, and the decision in the Keller case above cited clearly declares this to be insufficient.

Even the plaintiff's adjectives are not so harsh, when examined in context with her factual comparison of the jerk as being like cars coupling together. Certainly it cannot be said that such a jerk or jar is unusual, as in train opera-

tion cars must from time to time be switched, coupled and uncoupled. That is a normal incident of travel, such as the court recognized when he instructed the jury, (Tr. 314),

> "... the law recognizes that to a certain extent jerking, jolting, lurching and swaying of railroad trains is unavoidable in the practical operation of a train, and is reasonably incident to its ordinary and careful operation."

Plaintiff tacitly admitted this, for when asked the $64 question as to whether she had ever experienced a jerk like this she answered, (Tr. 91),

> "I couldn't say that I did. I have often noticed jerks in the train, *but I was never standing up on one.*" (Italics supplied).

This means in effect that she feels she cannot compare the jerk in question with previous ones because of a difference in her position (sitting or standing) when she felt them. Her answer was undoubtedly her best effort to make a comparison, but she found that it had to be so qualified as to become substantially meaningless. In any event, her statement certainly does not prove that the jerk alleged was so

> "unusual, extraordinary, unnecessary and the result of the careless and negligent operation of the train," (Tr. 314),

as to meet the requirement of the Court's instructions.

We think the description of her fall given by Mrs. Burroughs and her daughter, (Tr. 276, 282), passenger eye witnesses seated just across the aisle, is the true explanation of what happened. At the age of 78, and with her infirmity, the surprise and shock of a sudden fall following

her effort to reach the coat hook could well have left the plaintiff with the impressions she described. But whatever the situation may have been, we earnestly contend that the evidence falls short of the minimum requirement, viewed in the most favorable light for the plaintiff. Therefore, the verdict is contrary to the evidence.

D. *Was there negligence in not carpeting the floor between the seats?*

1. *Evidence summarized.*

The court instructed the jury, (Tr. 311):

> "there is not sufficient evidence in this case to support a recovery by the plaintiff against the defendant on the issue alone of whether the defendant was negligent in having a hard surfaced composition floor material in its Touralux coaches."

But the court on this point also instructed that if, (Tr. 313):

> "the defendant negligently provided insecure footing between the seats by a hard-surface composition floor"

and also negligently jerked the train, as a result of which *combination* the plaintiff was injured, she should recover.

This phase of the case presents a unique and interesting problem. In defining it, we must note some eliminations which will narrow it materially. There is no allegation or proof that the composition floor was defectively installed, or was out of repair, or had any foreign substance on it, or was excessively waxed and slippery. The whole question is whether it was negligence, *per se,* for the Touralux cars not to have carpet between the seats, instead of a bare, hard-surfaced composition floor. The whole attack is on

the planning and design of the Touralux car, and the jury was permitted to decide that the design was negligent and faulty on what we consider to be no evidence whatsoever thereof.

The sum total of the plaintiff's testimony concerning the floor is:

"Q. Did your feet slip in any way, Mrs. Harrington?

A. Just with the jerk, they went straight out from under me and I went flat." (Tr. 45).

"Q. Mrs. Harrington, how would you describe the jerk?

A. I couldn't describe it in any other way than like it was two cars went together and my feet went out from under me on the slippery floor. There wasn't any carpet there. My head must have struck on carpet." (Tr. 47).

Her daughter testified:

"A. Then I looked at the floor. I saw the floor was, I would say, an asphalt tiling, and I noticed down the aisle was carpeting.

"Q. What was the condition of the asphalt tile as to whether or not it was polished?

A. I could see it was a slippery floor. Whether or not additional, extra polish had been added, I could not state."

"Q. Was there a shine to the surface?

A. There was a shine, yes." (Tr. 124-26)

For the plaintiff, conductor Nolan testified that he believed carpeting is used throughout First Class sections of the train, (Tr. 32), that there is a composition floor between the seats in the Touralux cars and carpet on the center aisle, (Tr. 29), that the same composition floor is at the

aisleways in either end of the car, and in part of the smoking room ,(Tr. 36-7), and all through the day coaches, (Tr. 39).

Then the plaintiff proposed to offer expert testimony from an architect as to the comparative footing provided by a rug and asphalt tile, (Tr. 149). The Court finally excluded it on the ground that the subject is not one for expert testimony, (Tr. 152), although the defendant objected to it on other grounds as well, (Tr. 149).

There is not a word in the record to identify accurately the composition of this floor. There is nothing to show whether it is a type of material commonly used in public passageways or not. There is nothing to show that any other passenger in the train found the footing hazardous or insecure between the Touralux seats. There is nothing to show that in either railroad or all human experience such a floor has ever previously caused such an injury, or that by highest degree of care the railroad might have foreseen a hazard of injury like this. There is nothing to show that plaintiff's injury would not have occurred no matter what kind of floor material she was standing on. There is absolutely nothing but speculation and conjecture upon which to base a verdict that the difference between a carpet and this composition floor would have made the difference between no injury and plaintiff's injury. If it is common knowledge that a carpet is surer footing than a hard-surfaced composition floor, (which is a doubtful conclusion in some instances anyway) it is also common knowledge that very few public conveyances have carpeted floors.

The plaintiff has the burden of proving negligence as alleged. Aside from the simple statement that the floor was a bare composition on which her feet slipped when the jerk was felt, there is nothing to sustain the burden except the jury's "common knowledge" as to the relative merits of flooring materials. Surely the law has not sagged to the point where juries on their own knowledge can declare various portions of planned and designed railroad equipment to be negligently faulty. Then there would be as many standards of care (in effect) as there were juries establishing them, and the legal profession would become the designers and planners of carrier's equipment, with plaintiff's counsel trying to find fault by hindsight and defense counsel trying to foresee and forestall.

We do not deny that by proper pleading and proof plaintiff would be entitled to attack the design of the Touralux car, in omitting carpet between the seats. The pleading did not come until the close of plaintiff's case, (Tr. 153), after our objection earlier, (Tr. 149). The proof never came. We think it would require expert testimony from a person qualified and skilled in the various problems of railroad train design to furnish such proof. The matters of cost, maintenance, appearance, cleanliness, durability, safety, etc., obviously all have a bearing on design and selection of materials. Doubtless the Touralux may not be perfect, but there is nothing to show that it is not the equal of any modern train design, and to convict the Milwaukee of negligence *per se* simply because the carpet was only in the aisle seems to us wholly unreasonable.

2. *Jury may not review the design and planning of the Touralux car.*

We have not found any case precisely in point, but federal decisions under the Employer's Liability Act seem to establish the principles which ought to govern.

B & O Railroad v. Groeger,
266 U. S. 521, 69 L. Ed. 419,

is a case involving the necessity of using a fusible plug in the crown sheet of a boiler, a question specifically submitted to the jury for decision. The Supreme Court held this wrong, saying:

> "It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders, and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end. Tuttle v. Detroit, G. H. & H. Co. 122 U. S. 194, 30 L. Ed. 1116, 7 Sup. Ct. Rep. 1166; Richards v. Rough, 53 Mich. 216, 18 N. W. 785. The presence or absence of a fusible plug was a matter properly to be taken into consideration in connection with other facts bearing upon the kind and condition of the boiler in determining the essential and ultimate question, i. e., whether the boiler was in the condition required by the act."

A similar ruling was made with respect to whether a jury might decide that the railroad had constructed two yard tracks too close together.

> "The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place

in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its track and yards. Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 529, 69 L. ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries."

Toledo, St. L. & W. R. Co. v. Allen
276 U. S. 165, 72 L. Ed. 513.

A similar ruling was made with respect to whether a jury might decide that the railroad had improperly constructed a drainage system.

"There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters, or leave engineering questions, such as are involved in the construction and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries."

Delaware, L. & W. R. Co. v. Koske
279 U. S. 7, 73 L. Ed. 578.

A similar ruling was made with respect to whether a jury might decide that the railroad had negligently failed to require the handle of a certain valve to be turned up.

"Further, there is a fatal infirmity in the new ground of negligence alleged. It involves an engineering problem of railroading, and the judgment of engineers of the Railroad Company may not be reviewed by a jury with a view of finding actionable negligence. The change in the rule, and the omission of the requirement of turning retainer valve handles up, involving a survey of the grades and the brake system employed by the Railroad Company. The judgment of the Railroad Company's engineers in reaching the conclusion they did, may not be reviewed by a jury. Louisville & N. R. Co. v. Davis (C.C.A. 6) 75 F. (d) 849, and cases cited page 850."

Hylton v. Southern Railway Co.
87 F. 2d 393 (CCA 6)

We see no essential distinction, as far as the common knowledge of jurors is concerned, between the spacing of the yard tracks, (Allen case) or the open drainage system (Koske case), and the selection of flooring material. Many railroad operational factors enter the final selection of each, and the ruling should therefore be the same.

A few passenger-carrier cases apply the same principles. In

Byron v. Public Service Transport,
5 A. 2d 483, 122 N.J.L. 326, affirmed 10 A. 2d 733, 125 N.J.L. 91.

the passenger stuck his elbow out the window of a street car and a passing truck injured it. He claimed the car was improperly designed because it had no rear view mirror for the motorman and no window guards. He was nonsuited, the Court saying in part:

"Moreover, there was no evidence tending to show that this trolley car, as respects the lack of such a mirror and window guards on the right hand side thereof, dif-

fered in character from those in common use under like circumstances. There was nothing to show that it was not of standard construction. . . . The onus was upon Byron to establish by evidence that the car construction in the respects complained of was not in conformity with the common standard governing well-regulated common carriers employing like means of transportation. There must be proof of a breach of the duty thus owing to the passenger. The carrier is not an insurer of his safety."

We quote the following from

El Paso Electric Co. v. Barker
(Tex. C. of A.) 137 SW 2d 17, 134 Tex. 496,

"As the jury has found that the turning the corner was the cause of plaintiff's fall to the floor of the bus, and has in effect found that the bus was not turned in a negligent manner, the real question presented is whether or not plaintiff made any proof to sustain her allegation that it was negligent not to have an arm upon the seat. As we view the evidence, there was no proof to show that defendant owed plaintiff the duty of providing for her a seat with an arm. We are further of the opinion that the mere happening of the accident is not proof that defendant owed this duty.

Plaintiff having alleged that there was negligence in failing to have an arm on the seat, it was incumbent upon her to produce evidence to show prima facie that defendant owed the duty of constructing seats with arms. There was no proof whatever upon this point. The only circumstance that existed tending to show such duty is the fact that if there had been an arm upon the seat plaintiff would not have slipped off same. This proves nothing as regards the *duty* of placing an arm upon the seat. The case falls squarely within the rule stated by Shearman and Redfield, quoted with approval by Thompson on Negligence, volume 3, p. 220. Speaking of the character of proof essential in such a situation, it is said, 'There must be *prima facie proof* that the

proximate cause of such injury was a want of something which, *as a general rule,* the carrier was *bound to supply* or the presence of something which, as a general rule, the carrier was bound to keep out of the way.' (Emphasis partly by author.) If it should be conceded that jurors have a right to conclude that it was negligence not to have an arm upon the seat, merely because the presence of an arm might have prevented a fall from the seat, the conclusion would necessarily follow that another jury might conclude that some other injury would not have occurred but for the presence of the arm upon the seat; so that it could be said with the same certainty, based upon the same circumstance, that it was negligence to have the arm upon the seat. We have therefore concluded that there was a lack of proof showing that the absence of an arm constituted 'something improper or unsafe in defendant's appliances of transportation.' See Section 2757, Thompson on Negligence."

A very good case concerning the designing of a railroad car is

Paley v. Palmer, 28 A. 2d 844, 129 Conn. 392,

where it is said:

"His claim is that as he rose to leave his seat one foot was caught between a footrest attached to the seat in front of him and some mechanism under that seat and he was thrown to the floor of the car by the lurching of the train as it was coming to a stop. He charges the defendants with negligence in the way in which the footrest and mechanism were constructed and in the lurching and jolting of the car. The uncontradicted evidence was that the car was a modern air-cooled coach, that the same type of construction was used in about fifty coaches delivered to the defendants by the manufacturer and in coaches in use on several other large railroads, and that no accident caused by the mechanism in question had ever been reported to the defendants' claim agent who had supervision of all

claims arising in Connecticut. These circumstances furnish strong evidence that there was no negligence on the part of the defendants in using the type of construction in the coach. . . . The only basis upon which the jury could have found the defendants negligent was testimony as to the circumstances of the plaintiff's fall and photographs of the footrest and adjacent mechanism. As against the other evidence in the case, this would not reasonably justify a conclusion that the defendants were negligent in using a coach constructed as was the one in question."

Another railroad case is

Houston & T. C. R. Co. v. Werline,
(Tex.) 84 SW 2d 288,

involving a passenger burned by a pipe line beneath the seat. The evidence showed no defect in the equipment, that no other passengers had been injured similarly, and failed to show that a different or safer method was in use by other carriers. The Court held that where the system was of the standard and approved type, customarily used, the plaintiff must show that the prevailing custom is negligent.

A case somewhat analogous is

Valentine v. Northern Pacific,
126 Pac. 99, 70 Wash. 95.

It is a passenger case where the injury arose from a door to the washroom shutting on the plaintiff. Negligence was alleged in that the door had a strong spring which made it close too fast. As in the present case, there was no expert evidence, but just general testimony that the spring was stronger than in other cars, and caused the injury. The court said:

"A careful consideration of the evidence leads us to the conclusion that the case, so far as dependent upon

the first charge of negligence, was properly taken from the jury. It is matter of common knowledge that, when a swiftly moving train passes over even a well-constructed roadbed, there will be much swaying and lurching of the cars from side to side, especially in rounding curves. Common prudence would dictate that a door such as the one here in question should be provided with a spring or some other device having sufficient propulsive force to close and latch the door, and prevent it, when unlatched, from swinging with every lurch of the car. It seems too plain for speculation that any spring which would meet that purpose would cause the door to close with sufficient force to crush a finger inserted between the door strip and the hinge side of the door, as was the finger of the appellant. The evidence shows that on the doors of all cars examined by the appellants some such spring was used. True, both of the appellants testified that by examinations of other cars at times more or less remote from the time of the accident they found no spring so strong as the one on the door here in question. That was the sum of the evidence as to any defect in the door or spring. In view of the necessity and purpose of the spring, that evidence was not sufficient to raise an inference of negligence."

3. *No proof of proximate cause was made.*

As we pointed out above, the element of proximate cause is absent, however the court may feel about sufficiency of the basic proof of negligence. The record can be searched and searched, without finding a solitary shred of proof on which a jury could find that were it not for the composition floor the injury would not have occurred. True, plaintiff says her feet slipped on the floor, but nowhere does she describe the incident in enough detail to enable anyone to say she would not have slipped on the carpet it is

claimed should have been there. One cannot tell from the record whether the jerk produced the slip, or whether the slip made the jerk effective. To bundle the two together into the twin theory adopted by the court only serves to camouflage the point by making it generally relate to both without being actually identified with either. To attempt the actual identification is to plunge directly into speculation and conjecture.

In fact, we think the case falls well within the scope of the Washington case of

> Leach v. School District,
> 85 Pac. 2d 666, 197 Wash. 384

There, the defendant operated a school bus and was treated as a carrier. A pupil passenger was so jostled by another passenger that he lost balance and started to fall, putting his hands out against a glass door panel. The glass broke and he was cut. It was alleged that the carrier was negligent in not having safety glass (like a carpet?) in its door, but the court held:

> "A carrier, however, is not required to adopt and use every new and untried machine or appliance, or the *best in use,* but which is not in general use; * * *" (Italics ours) 10 C. J. 956, § 1374. . . .
> While a carrier of passengers is obligated to adopt new inventions, and to keep pace with new developments in science within reasonable limits, we are not prepared to say that shatter-proof or safety glass was so widely in use under the conditions involved here at the time appellant's injuries were sustained, or that a peril was occasioned by the absence thereof sufficient in character to require its presence, and that the failure to equip the busses with this new device in and of itself constituted negligence. . . .

> In conclusion we do not feel justified in imputing negligence to respondent by reason of its failure to have the doors of its busses equipped with the kinds of glass referred to in the amended complaint for the reason that the situation which presented itself, resulting in appellant's injuries, is not one which may reasonably be anticipated so as to require precautionary measures of that nature to safeguard against its occurrence."

E. *Can two legal, non-negligent acts be combined into a negligent act?*

It seems to us that the court put the jury into an impossible situation by giving the conflicting instructions we have quoted and discussed. Apart from our basic contention that there is no evidence to support the verdict, we further contend this Instruction No. 30 is erroneous for the reasons stated in our objection to it, (Tr. 329-31).

We cannot reconcile the conflict logically. If there was no evidence of a violent jerk, and no evidence of an unsafe floor, viewed separately, (and the court rightly so ruled, (Tr. 311), then the defendant was innocent on both counts. It had done nothing wrong. It breached no duty to plaintiff as its passenger. It had prepared and operated its equipment as required by law. Its liability on each count was zero.

Now, by what legal mysticism can zero plus zero equal one? This cannot be answered by fractions, for an act is considered either legal or illegal, and never half-legal.

By instruction No. 30 the normal train movement could become abnormal, and the safe floor become unsafe. Whereas neither was a proximate cause of plaintiff's injury, both could become the proximate cause. No such legal

metamorphosis is possible, and no jury could be expected intelligently to decide the parties' rights under such circumstances. Our objection that it was confusing, conflicting and incorrect surely should have been sustained.

Of course, it is idle to speculate as to what the jury actually thought about these instructions. They probably concluded that (a), the court was not intending to contradict himself; (b), since there could not be 100% negligence as to the jerk and could not be 100% negligence as to the bare floor, then (c), maybe the court meant that 60% jerk and 40% floor (or 10% jerk and 90% floor—who knows?) would be enough as long as it added up to 100% and involved at least 1% or more of negligence on each count. Whatever they concluded, the verdict is unsound and erroneous unless both counts of alleged negligence are supported by the evidence. This verdict is designed to stand only on two legs and appellee must support it on this appeal by two legs.

This we feel sure counsel cannot do. We say that because frankly we cannot find any published authority or decision for or against this percentage concept of negligence, and we have some confidence that we researched carefully. We find no reference to it in the learned Restatement of Torts, nor in the textbooks available to us. We cannot find a law review article or comment on it, though one would think so novel a doctrine would have had some treatment by the professors and students had it ever emerged in judicial form.

The most telling fact against considering a patchwork of miscellaneous minor sins as a substitute for an act of

legal negligence is that apparently no resourceful plaintiff's attorney has ever attempted the argument before, though the books are full of cases where one or more 100% acts of negligence have been held unproved by the evidence.

Here we are dealing with only two claimed part-acts, but suppose there were a dozen? Frequently a dozen acts of negligence are alleged, and one can well imagine the fantasy of confusion that would be created by an attempt to put a percentage weight on each act to see if the sum total finally reached 100. We cannot believe that so vulnerable and inviting a weakness in the defense has been so long overlooked. This doctrine would not just expose Achilles' heel; it would denude him!

CONCLUSION

For these reasons we contend the verdict and judgment are unsupported in fact and law, and that judgment should be ordered for the defendant in accordance with its motion. This would finally dispose of the litigation.

Failing this, the defendant is certainly entitled to a trial upon correct instructions, for which this judgment should be reversed.

Respectfully submitted,

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